

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	
FOR BENEFICIAL WATER USE PERMIT)	FINAL ORDER
93438-76F BY SANDRA M. &)	
DAVID OSWALT)	

* * * * *

The time period for filing exceptions, objections, or comments to the Proposal for Decision in this matter has expired. No timely written exceptions were received. Therefore, having given the matter full consideration, the Department of Natural Resources and Conservation hereby accepts and adopts the Findings of Fact and Conclusions of Law as contained in the October 7, 1996, Proposal for Decision, and incorporates them herein by reference.

WHEREFORE, based upon the record herein, the Department makes the following:

ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 93438-76F is granted to Sandra M. and David Oswalt to appropriate 42.00 gallons per minute up to 67.74 acre-feet of water per year from an unnamed tributary of Trail Creek at a point in Lot 74 of Trail Creek Phase 6 Double Arrow Ranch, generally located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 16 North, Range 15 West, Missoula County. The use shall be fish, wildlife, and recreation. The means of diversion shall be a pit located across the boundary between Lots 73 and 74, described as the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11 which is

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also the place of use. The period of diversion is from January 1 through December 31, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. The issuance of this permit by the Department shall not reduce the Permittees' liability for damages caused by the exercise of this permit, nor does the Department in issuing the permit in any way acknowledge liability for damage caused by the Permittees' exercise of this permit.

C. The permittee shall install a measuring device that will allow the flow rate and volume to be measured. The type of device and place of installation shall be determined by the Regional Manager of the Missoula Water Resources Regional Office. Upon receipt of this permit Applicants shall contact the Regional Manager at 1610 South 3rd St. West, Suite 103, P.O. Box 5004, Missoula, MT 59806.

D. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

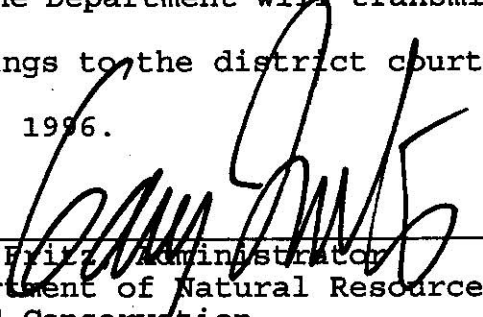
NOTICE

The Department's Final Order may be appealed in accordance with the Montana Administrative Procedure Act by filing a petition

in the appropriate court within 30 days after service of the Final Order.

If a petition for judicial review is filed and a party to the proceeding elects to have a written transcription prepared as part of the record of the administrative hearing for certification to the reviewing district court, the requesting party must make arrangements with the Department of Natural Resources and Conservation for the ordering and payment of the written transcript. If no request is made, the Department will transmit a copy of the tape of the oral proceedings to the district court.

Dated this 3 day of November, 1996.



Gary Fritz, Administrator
Department of Natural Resources
and Conservation
Water Resources Division
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6605

CERTIFICATE OF SERVICE

This is to certify that a true and correct copy of the foregoing Final Order was duly served upon all parties of record, first class mail, at their address or addresses this 12th day of November, 1996 as follows:

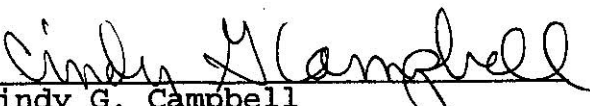
Sandra M. and David Oswalt
40803 Deerhorn RD
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David L. Pengelly
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Curt Martin, Manager
Karl Uhlig, WRS
Missoula Water Resources
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Missoula, MT 59806
(via electronic mail)

Double Arrow Ranch
Landowners Assn.
P.O. Box 307
Seeley Lake, MT 59868

Vivian A. Lighthizer,
Hearing Examiner
Department of Natural
Resources & Conservation
P.O. Box 201601
Helena, MT 59620-1601


Cindy G. Campbell
Hearings Unit Legal Assistant

BEFORE THE DEPARTMENT OF
NATURAL RESOURCES AND CONSERVATION
OF THE STATE OF MONTANA

* * * * *

IN THE MATTER OF THE APPLICATION)	PROPOSAL
FOR BENEFICIAL WATER USE PERMIT)	FOR
93438-76F BY SANDRA M. AND DAVID)	DECISION
OSWALT)	

* * * * *

Pursuant to the Montana Water Use Act and to the contested case provisions of the Montana Administrative Procedure Act, a hearing was held on September 5, 1996, at the Seeley Lake Ranger Station, three miles north of Seeley Lake, Montana, to determine whether a Beneficial Water Use Permit should be granted to Applicants for the above-entitled application under the criteria set forth in Mont. Code Ann. § 85-2-311(1) and (5) (1995).

APPEARANCES

Applicants, Sandra M. and David Oswalt, appeared at the hearing in person and by and through counsel, David L. Pengelly.

Objector, Double Arrow Ranch Landowners Association (DARLOA), appeared at the hearing by and through, Alvin F. Slaight, Jr.

George Frasca, Vice President of DARLOA, appeared as a witness for DARLOA.

Karl Uhlig, Water Resources Specialist with the Missoula Water Resources Regional Office of the Department of Natural Resources and Conservation (DNRC), appeared at the hearing and was called to testify by Applicants.

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EXHIBITS

Applicants offered three exhibits for the record. All were accepted without objection.

Applicants' Exhibit 1 is a plat map, approximately 24 inches by 36 inches of the Double Arrow Ranch subdivision.

Applicants' Exhibit 2 is an enlarged portion of a plat map, approximately 8.5 inches by 14 inches. The pertinent parts of this map are the common areas, Lots 73 through 80 and the location of Trail Creek.

Applicants' Exhibit 3 is an 8.5 inch by 11 inch copy of a portion of a topographic map which has been enhanced to show the proposed point of diversion the water rights owned by Double Arrow Enterprises, Double Arrow Golf Resort, and Double Arrow Ranch Association points of diversion on Morrell Creek, Trail Creek, and Drew Creek. There is one groundwater right, 76F-P084603 owned by Double Arrow Golf Resort, indicated on the map.

Objector offered four exhibits for the record. All of Objector's exhibits except one received objections to being accepted into the record. The Hearing Examiner reserved a ruling on those objections to be addressed in the Proposal for Decision.

Objector's Exhibit 1 is a one-page letter to Oliver Bender from DARLOA dated August 9, 1996. This letter requested Mr. Bender's opinion concerning Applicants' proposed pond. There are two statements at the end of the letter where Mr. Bender was asked to check the appropriate box.

Objector's Exhibit 2 consists of five pages. Each is the same letter identified in Objector's Exhibit 1 sent to five other members of DARLOA.

Applicants objected to these Objector's Exhibits 1 and 2 on the basis that they were not produced during the discovery period and that the letters contain an incorrect assertion that DARLOA owns all the surface water rights. The Hearing Examiner is not sure what benefit Objector expected from these exhibits. They simply restate Applicants' intent to construct a pond and that Double Arrow Ranch Board of Directors have unanimously disapproved the proposed project. They further indicate that DARLOA's covenants state that all surface water rights belong to DARLOA. All landowners checked the space on the first statement at the bottom of the letter so that Applicants now know their downstream neighbors agree with the Board of Directors in its disapproval of the pond. None of these items assist Objector in its case to prove the criteria for issuance of a permit have not or cannot be met. The letters do contain some value where they state the spring produces approximately 72 gallons per minute. On that basis, these exhibits are accepted into the record.

Objector's Exhibit 3 is a photograph taken in mid-August by George Frasca. It depicts the site of a pond in Lot 80 that does not hold water. This pond is not fed by the proposed source. This exhibit was accepted without objections.

Objector's Exhibit 4 is a photograph of a pond located on the west side of Morrell Creek approximately three-quarters of a

mile from the proposed site. This photograph was taken by George Frasca approximately 10 days before the hearing. This pond is fed by an irrigation ditch that intercepts Morrell Creek. This pond dries up in the summer. It is not a flow-through pond.

Applicants objected to this exhibit on the basis that it was not submitted during discovery and that it is irrelevant because it is an entirely different type of pond and is not located on Applicants' proposed source. The Hearing Examiner agrees with Applicants. This exhibit is irrelevant and is not accepted into the record.

The Hearing Examiner, having reviewed the record in this matter and being fully advised in the premises, does hereby make the following:

FINDINGS OF FACT

1. An application for beneficial water use permit in the name of and signed by David and Sandra M. Oswalt was received by the Department April 13, 1995. (Department file.)

2. Pertinent portions of the application were published in the *Seeley Swan Pathfinder* on June 15, 1995. Additionally the Department served notice by first-class mail on individuals and public agencies which the Department determined might be interested in or affected by the proposed appropriation. One timely objection was received by the Department. Applicants were notified of the objection by a letter from the Department dated July 27, 1995. (Department file.)

3. Applicants propose to appropriate 42.00 gallons per minute up to 67.74 acre-feet of water per year from an unnamed tributary of Trail Creek at a point in Lot 74 of Trail Creek Phase 6 Double Arrow Ranch, generally located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 16 North, Range 15 West, Missoula County.¹ The source originates from three springs located in the common area just east of Lot 73 of the Trail Creek Double Arrow Ranch Phase VI subdivision. The springs flow into two channels that combine into one channel before leaving the common area and flow into Lot 73. The means of diversion would be a pit located across the boundary between Lots 73 and 74, described as the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11. The proposed place of use is the pond as described above. The proposed period of diversion is from January 1 through December 31, inclusive of each year. (Department file and testimony of Karl Uhlig and David Oswalt.)

4. Applicants have proven by a preponderance of evidence the proposed means of diversion, construction and operation of the appropriation works are adequate. The proposed means of diversion is a pit 150 feet long by 75 feet wide excavated along the proposed source. The surface area of the pond would be .26 acres and the pond would have a 1.3 acre-feet capacity. The proposed source would flow through the pond. A structure to control flow and prevent fish from escaping the pond would be installed at the outlet. The pond would be constructed under the

¹Unless otherwise indicated, all legal descriptions are located in Township 16 North, Range 15 West, Missoula County.

supervision of an expert in the fishery field. (Department file and testimony of David Oswalt and Karl Uhlig.)

5. The proposed uses of water, fish, wildlife, and recreation, are beneficial uses of water. Aside from the obvious recreational benefit for friends and family, fishing and wildlife viewing, the water would be available for emergency fire fighting. The volume of water requested allows a complete water exchange four times per month to maintain a healthy fish population and account for natural seepage and evaporative losses. (Testimony of David Oswalt and Department file.)

6. Applicants have proven by a preponderance of evidence the water rights of a prior appropriator will not be adversely affected. Applicants' source is an unnamed tributary of Trail Creek. There are no water rights of record on this source which goes underground before it flows into either Trail Creek or Morrell Creek. All of the Double Arrow water rights are located above what would be the confluence of the unnamed tributary and Trail Creek if the unnamed tributary did have a surface flow. DARLOA, in its letters to the landowners, point out that according to the covenants all surface water rights belong to DARLOA, which may be true where claims for surface water have been filed. However, there is no record of any water rights on the unnamed tributary where applicants propose to construct the pond. (Department file, Applicants' Exhibit 3, and Objector's Exhibits 1 and 2.)

7. Applicants have proven by a preponderance of evidence there are unappropriated waters in the source of supply at the proposed point of diversion at times when the water can be put to the use proposed, in the amount Applicants seek to appropriate and that the amount requested is reasonably available during the period in which Applicants seek to appropriate. The source originates from three springs located in the common area just east of Lot 73 of the Trail Creek Double Arrow Ranch Phase VI subdivision. The springs flow into two channels that combine into one channel before leaving the common area and flow into Lot 73. The stream continues west, flowing across Lots 74, 75, 76, 77, 78, and 79 before disappearing into the ground in the southwest corner of Lot 79.² On May 16, 1995, Larry Schock, CES, and Wes McAlpin, WRS with the Missoula Water Resources Regional Office, measured the flow in the source to be 92 gallons per minute. On September 7, 1995, Karl Uhlig, WRS, measured the flow of the source to be 76 gallons per minute. Applicants' consultant, taking the composition, shape of the stream channel, and the average depth of the water, used the FlowMaster computer program to calculate the maximum flow for the proposed source. The maximum flow of the source according to this calculation was 76 gallons per minute. Since the source is spring fed, the stream flow is fairly constant. Objector in its Exhibits 1 and 2 state the springs produce approximately 72 gallons per minute.

²Mr. George Frasca testified the source went underground in the common area south of Lots 76, 77, 78, and 79.

(Department file, Objector's Exhibits 1 and 2, and testimony of Karl Uhlig.)

8. Applicants have proven by a preponderance of evidence the proposed use will not interfere unreasonably with other planned uses for which a permit has been issued or for which water has been reserved. There are no pending projects on this source for which permits have been issued or for which water has been reserved under state law. (Department file.)

9. No objections relative to water quality were filed against this application nor were there any objections relative to the ability of a discharge permit holder to satisfy effluent limitations of his permit.

10. Applicants have proven by a preponderance of evidence they have a possessory interest, or the written consent of the person with the possessory interest, in the property where the water is to be put to beneficial use. Applicants own the property where the water would be put to beneficial use. (Department file and testimony of David Oswalt.)

Based upon the foregoing Findings of Fact and the record in this matter, the Hearing Examiner makes the following:

CONCLUSIONS OF LAW

1. The Department gave proper notice of the hearing, and all substantive procedural requirements of law or rule have been fulfilled; therefore, the matter was properly before the Hearing Examiner. See Findings of Fact 1 and 2. Mont. Code Ann. §§ 85-2-307 and 309 (1995).

2. Applicants have met all the criteria for issuance of a beneficial water use permit. See Findings of Fact 3 through 10. Mont. Code Ann. § 85-2-311 (1995).

Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner makes the following:

PROPOSED ORDER

Subject to the terms, conditions, restrictions, and limitations listed below, Beneficial Water Use Permit 93438-76F is granted to Sandra M. and David Oswalt to appropriate 42.00 gallons per minute up to 67.74 acre-feet of water per year from an unnamed tributary of Trail Creek at a point in Lot 74 of Trail Creek Phase 6 Double Arrow Ranch, generally located in the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11, Township 16 North, Range 15 West, Missoula County. The use shall be fish, wildlife, and recreation. The means of diversion shall be a pit located across the boundary between Lots 73 and 74, described as the SW $\frac{1}{4}$ SE $\frac{1}{4}$ NE $\frac{1}{4}$ and SE $\frac{1}{4}$ SW $\frac{1}{4}$ NE $\frac{1}{4}$ of Section 11 which is also the place of use. The period of diversion is from January 1 through December 31, inclusive of each year.

A. This permit is subject to all prior existing water rights in the source of supply. Further, this permit is subject to any final determination of existing water rights, as provided by Montana law.

B. The issuance of this permit by the Department shall not reduce the Permittees' liability for damages caused by the exercise of this permit, nor does the Department in issuing the

permit in any way acknowledge liability for damage caused by the Permittees' exercise of this permit.

C. The permittee shall install a measuring device that will allow the flow rate and volume to be measured. The type of device and place of installation shall be determined by the Regional Manager of the Missoula Water Resources Regional Office. Upon receipt of this permit Applicants shall contact the Regional Manager at 1610 South 3rd St. West, Suite 103, P.O. Box 5004, Missoula, MT 59806.

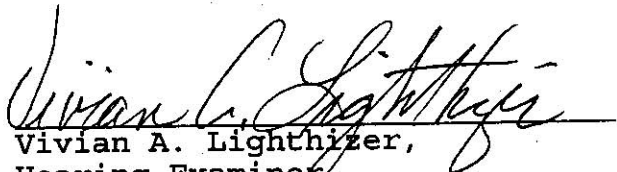
D. Upon a change in ownership of all or any portion of this permit, the parties to the transfer shall file with the Department of Natural Resources and Conservation a Water Right Transfer Certificate, Form 608, pursuant to Mont. Code Ann. § 85-2-424.

NOTICE

This proposal may be adopted as the Department's final decision unless timely exceptions are filed as described below. Any party adversely affected by this Proposal for Decision may file exceptions with the Hearing Examiner. The exceptions must be filed and served upon all parties within 20 days after the proposal is mailed. Parties may file responses to any exception filed by another party. The responses must be filed within 20 days after service of the exception and copies must be sent to all parties. No new evidence will be considered.

No final decision shall be made until after the expiration of the time period for filing exceptions, and due consideration of timely exceptions, responses, and briefs.

Dated this 7th day of October, 1996.


Vivian A. Lighthizer,
Hearing Examiner
Department of Natural Resources
and Conservation
P.O. Box 201601
Helena, Montana 59620-1601
(406) 444-6615

CERTIFICATE OF SERVICE


This is to certify that a true and correct copy of the foregoing Proposal for Decision was duly served upon all parties of record, first class mail, at their address or addresses this 7th day of October, 1996, as follows:

Sandra M. and David Oswalt
40803 Deerhorn RD
Springfield, OR 97478-9592

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218 East Front Street,
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Missoula, MT 59807

Double Arrow Ranch
Landowners Assn.
P.O. Box 307
Seeley Lake, MT 59868

Curt Martin, Manager
Karl Uhlig, WRS
Missoula Water Resources
Regional Office
1610 South 3rd St. West,
Suite 103
P.O. Box 5004
Missoula, MT 59806


Cindy G. Campbell
Hearings Unit Legal Secretary